1233

No. 3374

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

1233

HAWAIIAN PINEAPPLE COMPANY, LIMITED (a corporation),

Appellant,

vs.

MASAMARI SAITO and LIBBY, McNEILL & LIBBY OF HONOLULU, LIMITED (a corporation),

Appellees.

BRIEF FOR APPELLANT.

PETERS & SMITH,
FREAR, PROSSER, ANDERSON & MARX,
Honolulu, T. H.,
Solicitors for Appellant.

EDWARD HOHFELD,
San Francisco, California,
Of Counsel.

FILED

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Hawaiian Pineapple Company, Limited (a corporation), *Appellant,* vs. Masamari Saito and Libby, McNeill & Libby of Honolulu, Limited (a corporation), *Appellees.*	}

BRIEF FOR APPELLANT.

Note.—Figures herein in parentheses refer to transcript pages. Appellant Hawaiian Pineapple Company, Limited, and appellees Masamari Saito and Libby, McNeill & Libby of Honolulu, Limited, will be referred to as Pineapple Company, Saito, and Libby Company, respectively, for brevity.

I.

Abstract of the Case.

This is a suit in equity by the complainant and appellant, Pineapple Company, against Saito and the Libby Company, commenced in the Circuit Court of Hawaii, for an injunction to restrain Saito

from selling to the Libby Company, and the Libby Company from buying from Saito, merchantable Smooth Cayenne pineapples grown or owned or controlled by Saito. Upon return of the order to show cause issued upon the filing of the bill of complaint, a temporary writ of injunction was issued, which, after trial, was made perpetual.

The essential facts as disclosed by the pleadings and evidence are as follows:

Appellee Saito is a Japanese planter of pineapples on the Island of Oahu, in the Territory of Hawaii, and on May 18, 1916, which is the date of the agreement between Saito and the Pineapple Company which forms the subject-matter of this suit, was the owner of two leasehold interests in lands belonging to the Oahu Railway & Land Co. and which were located at Leilehua, on the Island of Oahu. These leases were dated respectively February 3, 1913, and January 2, 1915; and upon these demised lands Saito grew Smooth Cayenne pineapples.

Subsequent to the execution of said agreement with the Pineapple Company, Saito acquired two other leases of lands, also located at Leilehua and also belonging to the Oahu Railway & Land Co. These two leases were dated respectively July 1, 1916, and August 10, 1916, the former embracing real property described as Lots 9, 10 and 11, and the latter real property described as Lots 1, 2, 3 and 4.

On April 1, 1918, Saito entered into a contract with appellee, the Libby Company, for the sale to it of all of the Smooth Cayenne pineapples grown by him upon the lands covered by these last two leases dated respectively July 1, 1916, and August 10, 1916, and in the fulfillment of this contract Saito began to deliver pineapples grown by him on these lands.

Prior to the execution of the contract between Saito and the Libby Company, Saito had been selling to the Pineapple Company all of the pineapples grown by him both on the lands covered by his first two leases owned by him on May 18, 1916 (the date of his contract with the Pineapple Company) as well as all the pineapples grown by him on the lands covered by the two subsequent leases of July 1, 1916, and August 10, 1916.

The Pineapple Company under these circumstances commenced the present suit to restrain Saito from selling or delivering to the Libby Company, and to restrain the Libby Company from buying or receiving from Saito, any of these pineapples, upon the ground that the pineapples grown by Saito on his two subsequently acquired leases were covered by his prior agreement with the Pineapple Company dated May 18, 1916, and the Pineapple Company also sought an accounting against Saito and the Libby Company on account of pineapples already sold and delivered by Saito to the Libby Company.

All pineapples raised on the Island of Oahu during the year 1918 were contracted for and it was

impossible to buy any quantity of Smooth Cayenne pineapples on the island. The Pineapple Company at this time did not have sufficient pineapples contracted for to fill its orders and had searched the island for uncontracted pineapples, without success. Furthermore, the United States had applied to the Pineapple Company as well as to other canners for a certain per cent of their pack, in order to supply the needs of the army; in consequence the Pineapple Company needed every pineapple it had under contract to fill government requirements as well as its other orders. All pineapple canners were on the search for any pineapples which could be purchased, but were unsuccessful in their search. These and other facts were alleged in the complaint and established by evidence to the satisfaction of both the trial court and the Supreme Court of Hawaii, and they both held that the case was a proper one for injunctive relief if the pineapples grown on the subsequently acquired lands were covered by said agreement dated May 18, 1916, between the Pineapple Company and Saito.

The trial court granted a temporary injunction, and after trial a permanent injunction, restraining Saito from selling or delivering to the Libby Company, and restraining the latter from buying or receiving from Saito, any of Saito's pineapples grown on the subsequently acquired lands. The trial judge held that the contract so clearly by its language covered pineapples grown on subsequently

acquired lands, that Saito and the Libby Company "to avoid the issuance of an injunction have got to show the court that the contract does not mean what it says."

On appeal the Supreme Court, while conceding that the case was a proper one for equitable jurisdiction, held that it was "clear" that the intention of the parties to the contract was that the pineapples grown on subsequently acquired lands were not included in the contract between the Pineapple Company and Saito.

While the two courts thus agree that there is no ambiguity in the language of the contract, they have come to diametrically opposite conclusions as to the meaning of the contract. It is probable that in such a case the truth of the matter lies along the middle path, and that in fact there is an ambiguity in the contract which must be resolved by a construction in the light of the well-established principles applicable to the case.

The portions of the agreement between the Pineapple Company and Saito which contain the mutual obligations of the Pineapple Company and Saito respectively and which contain the ambiguity in question are the following:

> "The Pineapple Company agrees that during the term of four years beginning May 1, 1916, and ending April 30, 1920, it will handle and buy under the conditions as hereinafter detailed, and with such exceptions as are hereinafter stated, all the merchantable Smooth Cayenne pineapples that may be grown by the

> Planter on his present holdings at Leilehua, or elsewhere on the Island of Oahu, or that he may own or control on the Island of Oahu.
>
> "The Planter agrees that he will deliver to the Pineapple Company under the terms and conditions and with the exceptions hereinafter contained, all the merchantable Smooth Cayenne pineapples he may grow at Leilehua, or elsewhere on the Island of Oahu, or that he may own or control on the Island of Oahu, during the term stated."

The ambiguity admittedly lies in the first paragraph quoted above. The Pineapple Company contends, and the trial court found, that with the implied and understood portions thereof supplied, the first paragraph should read as follows:

> "The Pineapple Company agrees that during the term of four years * * * it will * * * buy * * * all * * * pineapples that may be grown by the Planter on his present holdings at Leilehua, or (that may be grown by the Planter) elsewhere on the Island of Oahu, or (pineapples) that he may own or control on the Island of Oahu."

Saito and the Libby Company contend, and the Supreme Court of Hawaii have found, that with the implied portions of this paragraph supplied, it should read as follows:

> "The Pineapple Company agrees that during the term of four years * * * it will * * * buy * * * all * * * pineapples that may be grown by the Planter on his present holdings at Leilehua, or (on his present holdings) elsewhere on the Island of Oahu, or (on his present holdings) that he may own or control on the Island of Oahu."

And the Supreme Court in consonance with such construction of the agreement dissolved the injunction and dismissed the bill.

Within the time allowed by law appellant filed its petition for order allowing appeal from said decree, accompanied by specifications of errors, which petition was granted and this appeal allowed by appropriate order (209).

Thereafter the Chief Justice prepared and caused to be filed a statement of the evidence in the case (247).

There are the following points in the case:

1. That the contract dated May 18, 1916, between the Pineapple Company and Saito was by the parties intended to include pineapples grown, owned or controlled by Saito on the Island of Oahu during the term of said contract, whether on lands held by Saito at the time of the contract or subsequently acquired.

This construction of the contract will be sought to be established by the appellant Pineapple Company by reference to the folowing facts:

(a) The intrinsic evidence contained within the body of the contract itself.

(b) The extrinsic evidence showing the circumstances under which the contract was made, including the situation of the subject matter of the contract and the parties to it.

(c) The extrinsic evidence showing the practical construction of the contract by the parties thereto.

2. That the case is a proper one for the equitable jurisdiction of the court.

II.

Assignment of Errors.

For convenience of the court appellant here prints the assignment of errors served and filed with the petition for allowance of appeal upon which appellant here relies, and the questions above stated arose.

1. The court erred in not holding that by the terms of the contract between M. Saito and Hawaiian Pineapple Company, Limited, dated May 18, 1916, said M. Saito is under obligation to sell to the complainant, for the term stated in said contract, all of the merchantable Smooth Cayenne pineapples that may be grown by the said M. Saito upon the Island of Oahu on land which was leased by said M. Saito after the said contract dated May 18, 1916, was entered into.

2. The court erred in finding that by the terms of said contract between Hawaiian Pineapple Company, Limited, and M. Saito dated May 18, 1916, said M. Saito is under no obligation to sell to the complainant, for the term stated in said contract, any or all of the merchantable Smooth Cayenne

pineapples that may (166) be grown by M. Saito upon the Island of Oahu on land which was leased by said M. Saito after said contract dated May 18, 1916, was entered into.

3. The court erred in not holding that by the terms of the contract between Hawaiian Pineapple Company, Limited, and M. Saito, dated May 18, 1916, said M. Saito is under obligation to sell to complainant for the term stated in said contract all of the merchantable Smooth Cayenne pineapples grown by the said M. Saito upon Lots Nos. 9, 10 and 11 leased by said M. Saito from the Oahu Railway and Land Company under lease dated July 1, 1916.

4. The court erred in finding that by the terms of said contract between Hawaiian Pineapple Company, Limited, and M. Saito, dated May 18, 1916, said M. Saito is under no obligation to sell to the complainant, for the term stated in said contract, any or all of the merchantable Smooth Cayenne pineapples grown by the said M. Saito upon Lots Nos. 9, 10 and 11 leased by said M. Saito from the Oahu Railway & Land Company under lease dated July 1, 1916.

5. The court erred in not holding that by the terms of the contract between Hawaiian Pineapple Company, Limited, and M. Saito, dated May 18, 1916, said M. Saito is under obligation, for the term stated in said contract, to sell to complainant all of the merchantable Smooth Cayenne pineapples grown by the said M. Saito upon Lots Nos. 1, 2, 3

and 4 leased by said M. Saito from the Oahu Railway and Land Company under lease dated August 10, 1916.

6. The court erred in finding that by the terms of said contract between Hawaiian Pineapple Company, Limited, and M. Saito, dated May 18, 1916, said M. Saito is under no obligation, for the term stated in said contract, to sell to the complainant any or all of the merchantable Smooth Cayenne pineapples grown by the said M. Saito upon Lots Nos. 1, 2, 3 and 4 leased by said M. Saito (167) from the Oahu Railway and Land Company under lease dated August 10, 1916.

7. The court erred in not holding that by the terms of the contract between M. Saito and Hawaiian Pineapple Company, Limited, dated May 18, 1916, said M. Saito is under obligation to sell to the complainant all of the merchantable Smooth Cayenne pineapples owned or controlled by said M. Saito upon the Island of Oahu during the term stated in said contract.

8. The court erred in finding that by the terms of said contract between M. Saito and Hawaiian Pineapple Company, Limited, dated May 18, 1916, said Saito is under no obligation to sell to the complainant all of the merchantable Smooth Cayenne pineapples which he may own or control on the Island of Oahu during the term stated in said contract.

9. The court erred in finding that there was no contemporaneous construction of the contract

which showed that Saito and the Hawaiian Pineapple Company, Limited, intended by said contract dated May 18, 1916, to obligate the Hawaiian Pineapple Company, Limited, to buy and M. Saito to sell all pineapples which might be raised, owned or controlled by the said Saito upon the Island of Oahu at any time during the continuance of said contract.

10. The court erred in not finding that there was a contemporaneous construction of said contract showing that M. Saito and the Hawaiian Pineapple Company, Limited, intended by their contract to obligate the Hawaiian Pineapple Company, Limited, to buy and M. Saito to sell all pineapples which might be raised, owned or controlled by the said Saito on the Island of Oahu at any time during the continuance of said contract. (168)

11. The court erred in finding the issues on the construction of the contract for the respondents.

12. The court erred in not finding the issues upon the construction of the contract for the petitioner.

13. The court erred in decreeing that the decree appealed from should be vacated and set aside, the injunction dissolved and the complainant's bill dismissed.

14. The court erred in not decreeing that the decree appealed from be affirmed.

15. The decree is against the manifest weight of evidence.

16. The decree is contrary to law.

III.

Argument.

First Point.

THE LANGUAGE OF THE CONTRACT TAKEN AS A WHOLE SHOWS THAT IT WAS THE INTENT OF THE PARTIES THAT THERE SHOULD BE INCLUDED THEREIN PINEAPPLES GROWN, OWNED OR CONTROLLED BY SAITO ON THE ISLAND OF OAHU DURING THE TERM OF SAID CONTRACT, NOT ONLY ON LANDS HELD BY SAITO AT THE DATE OF THE CONTRACT BUT ALSO ON LANDS ACQUIRED SUBSEQUENT THERETO.

The first paragraph of the agreement between the Pineapple Company and Saito quoted above (ante p. 5) may be graphically represented thus:

> "The Pineapple Company agrees during the term of said contract to buy all
> 'pineapples
> { that may be *grown* by the Planter
> { on his present holdings at Leilehua,
> or
> elsewhere on the Island of Oahu, }
> or
> that he may *own* or *control* on the Island of Oahu.' "

According to this interpretation the Pineapple Company agrees to buy from Saito, the Planter, all the *pineapples* either *grown* or *owned* or *controlled* by the Planter in the Island of Oahu—a natural and meaningful interpretation which gives force and effect to every word and clause therein and which, as we shall subsequently see, brings it into perfect har-

mony with the subsequent obligation of the Planter and with other portions of the contract to which attention will hereafter be called.

The interpretation of the contract as contended for by Saito and the Libby Company and as made by the Supreme Court may similarly be represented thus:

> "The Pineapple Company agrees during the term of said agreement to ~~sell~~ buy all 'pineapples
> that may be grown by the Planter
> on his present holdings
> or { at Leilehua, elsewhere on the Island of Oahu,
> or { that he may own or control
> on the Island of Oahu.' "

According to the above interpretation suggested by the appellees, the Pineapple Company agreed to buy all pineapples grown by the Planter on his *present holdings* whether located *at Leilehua* or *elsewhere* on the Island of Oahu or *whether owned or controlled by him in the Island of Oahu*—an interpretation which practically nullifies and makes redundant the words "that he may own or control in the Island of Oahu", since if the words "at Leilehua, or elsewhere in the Island of Oahu" modify the words "present holdings", then the words "that he may own or control in the Island of Oahu" add nothing to that already expressed previously by the

words "present holdings at Leilehua, or elsewhere in the Island of Oahu". Certainly his "present holdings at Leilehua or elsewhere on the Island of Oahu" must be either *owned* or *controlled* by him, and therefore the addition of this last clause would merely create a redundancy. It is, however, one of the canons of construction that

> "no word in a contract is to be treated as a redundancy if any meaning reasonable and consistent with other parts can be given to it". (13 C. J. 535.)

It must be conceded by both sides that if the obligation of the Pineapple Company be taken by itself, both of the above interpretations are *possible* ones. It must also be conceded by both sides that neither of the above interpretations is a *necessary* one. Different minds in reading the paragraph will take, some one view, and some the other view, of its meaning. It is practically impossible to tell with entire assurance which interpretation is the correct one if this paragraph of the agreement be considered solely by itself. Appellant ventures to submit that the comma (,) after "Leilehua", and before the words "or elsewhere on the Island of Oahu", tends to support appellant's view more than it does that of appellee. If the words "or elsewhere on the Island of Oahu", modify the words "present holdings", it would, we think, be better grammatical construction to omit the comma so as to bring into close association the words "Leilehua or elsewhere".

But this matter of punctuation is not, of course, a controlling circumstance; it is simply one of the several considerations to which the attention of the court will be attracted, all tending to sustain the construction of the agreement contended for by appellant.

It is of course one of the cardinal rules of construction that

> "a contract must be construed as a whole, and that the intention of the parties is to be collected from the entire instrument and not from detached portions, in being necessary to consider all of its parts in order to determine the meaning of any particular part as well as of the whole". (13 C. J., 525, and cases cited.)

In obedience to this principle we pass to the following paragraph of the agreement which contains the obligation of the Planter whereby he agrees to sell, during the term of the agreement, all

"pineapples
or { that he may *grow* or { at Leilehua, elsewhere on the Island of Oahu,
that he may *own* or *control* on the Island of Oahu, }
during the term stated."

The Supreme Court furthermore held (186 to 187) that the obligation of the Planter to sell all of his pineapples grown, owned or controlled on the Island of Oahu was unambiguous and if considered without reference to the ambiguous obligation of the Pineapple Company as set forth in the preced-

ing paragraph of the contract would clearly necessitate a holding that the Planter was obligated to furnish pineapples to the Pineapple Company, both from holdings held by him at the time of the contract, as well as from lands subsequently acquired by him.

In substance the Planter has agreed to sell all pineapples either *grown,* or *owned,* or *controlled,* by him on the Island of Oahu, and this is the only possible interpretation of this sentence. It will be noted that this sentence in all of its parts balances with, and dovetails into, the obligation of the Pineapple Company as interpreted above by appellant. Indeed if we add to the words, "at Leilehua", in the obligation of the Planter, the words "on his present holdings", we have not changed or made ambiguous the obligation of the Planter in any respect and thereby we have in the obligation of the Planter substantially the exact duplicate of the language contained in the agreement of the Pineapple Company, with the exception that the words "on his present holdings" follow instead of precede the words "at Leilehua". Or, conversely, if in the obligation of the Pineapple Company we transpose the words "on his present holdings", which appear before the words "at Leilehua", and place them after these words, no ambiguity any longer exists in the obligation of the Pineapple Company, and its obligation and that of the Planter are identical in meaning and free of all ambiguity, and means just what appellant contends for.

> "It is permissible to transpose words in a contract in order to make its meaning more clear and to carry out the intent of the parties." (13 C. J., 535, and cases cited.)

We have thus seen that by wholly unambiguous language the Planter agreed to sell to the Pineapple Company all the pineapples either *grown* by him, or *owned,* or *controlled* by him, in the Island of Oahu, the evident intent being that the Planter was to obligate himself to sell all of his pineapples, however acquired, on the Island of Oahu, to the Pineapple Company, and that the Pineapple Company was likewise reciprocally to be bound to buy all of the pineapples *grown, owned* or *controlled* by the Planter on the Island of Oahu.

Subsequent portions of the contract where similar language is used reinforce most strongly this idea and compel the construction contended for by appellant. Thus the parties agree:

> "It is further mutually agreed by the parties hereto, that in the event of destruction by fire or convulsion of nature, of the cannery of the Pineapple Company, or strike of the employees in said cannery, all *obligation on the part of the Pineapple Company* under the terms of this instrument to accept and pay for any *pineapples grown, owned* or *controlled* by the Planter, thereby lapses; and the said Planter hereby waives all claim on the said Pineapple Company to accept and pay for any pineapples in the event of such destruction * * * until such time as the said Pineapple Company shall have notified in writing the Planter that it has again prepared itself to receive and handle such pineapples." (30)

Again:

> "It is further mutually agreed that in case of the existence in the Territory of Hawaii of a state of war, the *obligation on the part of said Pineapple Company* under the terms of this instrument to accept and pay for *pineapples grown, owned* or *controlled* by the Planter may at the option of the Pineapple Company be suspended for such period as such state of war renders it impossible or impracticable for said Pineapple Company to conduct its business, it being understood that in the case of a partial cessation of canning operations owing to such state of war, it will be the intent of the Pineapple Company to save and handle as great a portion of the pineapples of the Planter as possible." (30-31)

and again

> "It is further mutually agreed that in case the supply of tin cans of the Pineapple Company is shut off or exhausted from causes beyond the control of the said Pineapple Company the *obligation of the Pineapple Company* to accept and pay for any *pineapples grown, owned,* or *controlled* by the Planter thereby lapses for such period of time as such supply of tin cans is shut off in whole or in part, it being understood that in case of a partial shortage of said cans, the Pineapple Company will accept and pay for as much fruit as possible." (31)

The Supreme Court held (186) that there is *no obligation on the part of the Pineapple Company* to buy any "pineapples owned or controlled" by the Planter, but only pineapples "grown" by him, the Supreme Court holding that all of the clauses following the words, "present holdings," in the

obligation of the Pineapple Company modify and refer to "present holdings" and not to "pineapples." But the attention of the Supreme Court was not called to, and it did not consider or discuss, the three paragraphs of the contract last quoted, which *ipsissimis verbis* refer to "the obligation on the part of the Pineapple Company," to buy "any *pineapples grown, owned,* or *controlled* by the Planter." Since the only obligation of the Pineapple Company is contained in the alleged ambiguous paragraph first quoted in this brief (page 5), and since in the three paragraphs appearing thereafter in said contract and which have been quoted above, this obligation of the Pineapple Company has been clearly and unambiguously defined to be that of buying all the "*pineapples grown, owned,* or *controlled* by the Planter," it would seem to follow that this definition of the obligation of the Pineapple Company by the parties themselves furnishes a complete, as well as the best, interpretation of the Pineapple Company's obligation which can possibly be furnished. If so, then the interpretation suggested by the appellees, and adopted by the Supreme Court, must be entirely repudiated.

The Supreme Court furthermore in its opinion in support of its holding that the contract did not include pineapples grown on subsequently acquired lands referred to the provision contained therein requiring the Planter to "deliver said fruit f. o. b. railroad cars at Leilehua, Oahu," the court saying (187-8);

> "Assume that subsequently to the date of the contract Saito acquired land at Waimanalo or at some other locality remote from and inaccessible to Leilehua, and that upon this land he grew and produced pineapples. In that event if the construction urged by complainant is to be adopted Saito would be required to deliver these pineapples to the company f. o. b. cars at Leilehua at $14.00 per ton, when, from the geographical and physical conditions prevailing, which are within the common knowledge of all, the expense of transportation alone would far exceed that amount."

There are several answers to this objection.

In the first place, in the agreement of April 1, 1918, between the Libby Company and Saito, respecting the purchase and sale of the pineapples claimed by appellant from Saito on future acquired lands, the Libby Company has agreed to take delivery from Saito of all Smooth Cayenne pineapples

> "that may be grown by the said Planter on the Planter's said holdings, or elsewhere in the City and County of Honolulu, Territory of Hawaii, or that the Planter may own or control in the City and County of Honolulu."

This is substantially the same language as is used in the contract between the Pineapple Company and Saito and the contract between the Libby Company and Saito is replete with passages showing that the Libby Company contracted for all of Saito's pineapples wherever *grown, owned* or *controlled* in the City and County of Honolulu, and whether on lands then owned by him or subsequently

acquired. (86) Yet in this contract the Libby Company is required to deliver lug boxes to the Planter at Leilehua, and the Planter is required to "deliver the said fruit f. o. b. cars Leilehua, Oahu." Evidently the same practical reasons existing in the case of the Pineapple Company and Saito, existed when the contract between the Libby Company and Saito was executed. At any rate the Libby Company is estopped from urging the paragraph in the contract of the Pineapple Company with Saito for delivery of the pineapples at Leilehua when it has incorporated under similar conditions the same provision in its own contract.

In the second place, for practical purposes, although the Island of Oahu is the only geographical limitation upon the location of pineapples that the Planter may grow or own or control, accessibility to the railroad cars at Leilehua, at which lug boxes are to be furnished by the Pineapple Company, and at which the pineapples are to be delivered by the Planter, practically restricts the general language of the contract in respect to the geographic location of the pineapples which the Planter may *grow,* or *own,* or *control* on the Island of Oahu. Accessibility to the railroad cars at Leilehua is hence a factor. For these reasons the Planter will not, as a practical matter, grow pineapples at "Waimanalo or some other locality remote from and inaccessible to Leilehua." As the Supreme Court suggested, (187) Saito might do so; for similar reasons he might do so under his present contract with the

Libby Company, but such a course of action by Mr. Saito is merely hypothetical, conjectural, and highly improbable, without any relation to the actual facts of the case, and as a practical matter Mr. Saito could not possibly be prejudiced by this provision of the contract with the Libby Company any more than he evidently thought he could be when he entered into his contract with the Pineapple Company.

In the third place, it would be a natural assumption that the Planter, for purposes of economy, would not spread out beyond lands already accessible to the shipping point employed by him for shipping pineapples that he grew on his original holdings. A canner such as the Pineapple Company would, of course, make contracts for the supplying to it of pineapples, only with growers who already had some *present holdings.* This would form the center and nucleus for the contract, and the language of the contract would be adapted to meet the situation in view of such *present holdings.* Hence the uniform form of contract (229-236), which left a blank (229) to designate the Planter's "present holdings," and a blank (230) to designate the delivery point nearest his present holdings. This applies equally to pineapples that the Planter might "own or control" as well as to those which he might "grow." It would be a natural assumption that a man's business activity would be employed in and around the same place where he had his original holdings and no doubt his home, as was

the case of Saito. Pineapples that the Planter might own or control would be pineapples that he might secure by purchase or otherwise than by planting, and have such an interest in that he was able to dictate their disposition, hence such pineapples as he might own or control were always deliverable at the same place in and about which he would be engaged in growing pineapples.

The Supreme Court laid considerable stress upon a provision of the contract in respect to the place of furnishing lug boxes and delivery of fruit, and put, as we have seen, the hypothetical case of the unreasonableness of a contract in respect to pineapples grown by Saito at Waimanalo or some other locality remote from and inaccessible to Leilehua. The author of the Supreme Court's opinion, however, did not appreciate the effect of holding that the contract applied to "present holdings elsewhere on the Island of Oahu." Let us assume that Saito had holdings at Waimanalo at the time of the execution of the contract, and subsequently planted pines thereon. Would it not be his plain duty under his covenant to deliver fruit to the railroad cars at Leilehua, to haul his fruit from Waimanalo to that shipping point? Can there be any question about that? Unreasonableness, to be a test, must be such a condition of affairs as would indicate that the contingency would not have been in the minds of the parties when they contracted, but according to the theory of appellees, sustained by the decision of the Supreme Court, the parties did have in mind

"present holdings elsewhere on the Island of Oahu" than his holdings at Leilehua, which would include, if they existed, present holdings at Waimanalo, and hence Saito under his own theory of the case, knew, or must have known, that he was bound under this contract (as interpreted by him) to deliver to appellant at the railroad cars at Leilehua, all pines that he might grow on such present holdings at Waimanalo.

There is no objection to contracting parties confining the general terms of a contract by provisions controlling the fulfillment of those terms. The impracticability of the Planter's growing pines on lands subsequently acquired at Waimanalo or any other locality remote from or inaccessible to Leilehua, or purchasing or controlling pineapples in a similar locality, no doubt appealed to both, and in the preparation by the Pineapple Company of the uniform contract it was calculated in advance that the place of delivery of fruit by its practical operation would control the general covenants in respect to pines grown by the Planter "elsewhere on the Island of Oahu" than on his original holdings, or pineapples owned or controlled by the Planter elsewhere than in or about the stipulated place of delivery. Perhaps the Pineapple Company did not want Saito to roam all over the island, either in the growing, or in the purchase, or in the control of pineapples, and left the shipping point to control the radius of his activity. Moreover, it would be relatively just as much a hardship for the can-

nery to deliver lug boxes at remote points, as it would be for the Planter to make delivery there of his fruit. *In short, the Supreme Court looked to the form of the contract and not to its substance.* The provision simply means that it was in the minds of both parties that the Planter should be confined in respect to future acquired lands for growing pines, or becoming otherwise interested in pines to the extent of owning or controlling them, to the same general location as his original holdings. It is not the case of an oversight on the part of either party in failing to provide delivery points elsewhere on the Island of Oahu than at Leilehua. To fix them in advance was, of course, impracticable. To allow the Planter to plant anywhere and everywhere, or to own or control pines anywhere and everywhere, was likewise impracticable, especially in view of the fact that it is a matter of common knowledge that the line of the railroad is short, and that Leilehua, Wahiawa, and Pupukea are the only districts on the island in which pineapples are grown and which are tapped by the railroad. Therefore the covenant as to the delivery of fruit at Leilehua is perfectly reasonable. The shipping point was fixed, and Saito could protect himself against any unreasonableness in its operation. If he persisted in planting pines, or becoming interested in pines to the extent of owning or controlling them, at places remote from and inaccessible to the shipping point at Leilehua, that was his own lookout. It was up to him to deliver the fruit to

railroad cars at Leilehua, and all he had to do to escape any alleged hardship was to refrain from planting or otherwise dealing in pines remote from and inaccessible thereto, and confine himself to the planting, or owning, or controlling of pines within reasonable hauling distance of the shipping point. The remedy lay absolutely with him. The contract could not operate with respect to any pines, without Saito's consent. He had to take the initiative. If he did not care to conduct his business in an ordinarily businesslike manner, as the contract assumed that he would, then his was the penalty.

Again, were Saito bearing the expense of delivery of the pines to the cannery of the Pineapple Company at Honolulu it might be a different proposition, but his prices were f. o. b. railroad cars at Leilehua. The expense of hauling to the railroad cars was on Saito. The expense of hauling them from the delivery station on the railroad, to the cannery of the Pineapple Company, was on the Pineapple Company. If the terms of the contract were self-operative, so that at the instance of the Pineapple Company certain pineapples became subject to the contract, the hauling of which to the railroad cars at Leilehua became an increased burden, the situation might possibly be different, but Saito could protect himself at all times.

Furthermore, the inferences of fact to be drawn from the mutual covenants of the parties in regard to the delivery of the pineapples must appear in evidence and not be based upon supposition.

The reference by the Supreme Court to Waimanalo is unfair. Waimanalo is not on the railroad. The delivery of fruit was f. o. b. railroad cars. Moreover, the general knowledge of local railroad facilities by the parties would indicate that they intended to limit the Planter, as far as the Island of Oahu was concerned, to localities within reasonable hauling distance of Leilehua station, and did not contemplate remote localities off the line of the railroad.

We thus have the wholly clear and unambiguous covenant of the Planter to the effect that he was obligated to sell all of his pineapples grown on lands held by him, whether at the time of his contract or subsequently acquired; and we have the three later provisions of the contract expressing in *clear and unambiguous language that the obligation of the Pineapple Company was likewise to purchase from the Planter all pineapples grown, owned or controlled by him on the Island of Oahu.* Such ambiguity, therefore, as may be conceded to exist in the paragraph of the contract setting forth the obligation of the Pineapple Company, may be resolved and removed entirely when read in connection with the other wholly unambiguous portions of the contract. A person naturally would not, as did the Supreme Court, seize upon the ambiguous portion of a contract and guess at its construction by a consideration of its language, without reference to the remaining portions of the contract, and, this done, then essay to bring harmony into the contract as

a whole by narrowing the scope of wholly unambiguous parts of the contract, to have them correspond with the supposed interpretation of the ambiguous portions thereof. The interpretation of the Supreme Court defining the Pineapple Company's obligation to be that of purchasing pineapples grown only on the present holdings of the Planter, wherever located or owned or controlled on the Island of Oahu, nullifies and ignores the later clear and unambiguous definition of the Pineapple Company's obligation which, as we have seen, occurs three times in a subsequent paragraph of the contract, and needlessly narrows and in part nullifies the clear and unambiguous terms of the Planter's obligation contained in the next paragraph of the contract. In scientific research and in the ordinary affairs of life we are taught to go from the "known to the unknown." By analogy, in seeking to find the intention of the parties to a contract from an inspection of its terms, it would seem to be both scientific and natural for the court to proceed from the unambiguous portions of the contract, where the intent of the parties is clearly expressed, and then proceed to the ambiguous portions thereof for the purpose of attempting to resolve the ambiguities in the light of the clear and unequivocal portions of the contract.

Appellant cannot refrain from again emphasizing the rule of construction applicable to all contracts, that the contract should be construed as a whole, in an endeavor to bring all parts, if possible, into har-

mony one with another, and in an endeavor to give every word, phrase and clause a meaning, if possible. This rule is excellently stated in

> Unita Tunnel etc. Co. v. Ajax Gold Mining Co., 141 Fed. 563, 566,

wherein the court said:

> "The purpose of a written contract is to express the concurring intention of the minds of parties when it is made. Hence the object of its construction or interpretation is to ascertain the actual intent and meaning of the parties when they executed it. Familiar and serviceable rules of interpretation of agreements are that the Court may place itself as near as may be in the situation of the parties to the agreement at the time it was made, and may then endeavor to ascertain from the terms of the contract, in the light of the surrounding facts and circumstances, the actual intent and meaning of the parties; *that this intention must be deduced, not from specific provisions or from fragmentary parts of the instrument, but from its entire context, because the intent is not evidenced by any part or provision of it, or by the instrument without any part or provision, but by every part and term so construed as to be consonant with every other and with the entire agreement; that every provision of the instrument should be given its ordinary meaning and effect, if possible, and no part should perish by construction; and that the actual intention of the parties, when ascertained, must prevail, regardless of dry words, inapt expressions, or careless recitations in the contract.*"

It is, therefore, respectfully submitted that the intrinsic evidence afforded by an examination of the contract within its four corners, necessitates a

construction by the court to the effect that the obligations of the Pineapple Company and of the Planter were to buy and sell respectively all the pineapples grown, owned or controlled by the Planter on the Island of Oahu, both on his holdings at the time of his contract, or subsequently acquired.

Second Point.

THE EXTRINSIC EVIDENCE SHOWING THE CIRCUMSTANCES UNDER WHICH THE CONTRACT WAS MADE, INCLUDING THE SITUATION OF THE SUBJECT-MATTER OF THE CONTRACT AND OF THE PARTIES TO IT, ESTABLISHES THAT THE PARTIES INTENDED TO INCLUDE PINEAPPLES GROWN, OWNED, OR CONTROLLED ON THE ISLAND OF OAHU SUBSEQUENT TO THE DATE OF SAID CONTRACT.

> "In arriving at the intention of the parties, where the language of a contract is susceptible of more than one construction, it should be construed in the light of the circumstances surrounding them at the time it is made, it being the duty of the Court to place itself as nearly as may be in the situation of the parties at the time, so as to view the circumstances as they view them, and so to judge of the meaning of the words and the correct application of the language of the contract." (13 C. J., 542, and cases cited.)

With this elementary and wholesome principle of construction in mind, let us turn to the evidence in the case.

On May 18, 1916, the date of the contract between the Pineapple Company and Saito, all of Saito's

holdings were located at Leilehua, Oahu, and comprized approximately one hundred and fifty acres of arable land, and this fact was of course known to both parties to the contract. (228) The exact acreage of Saito's present holdings was known to the Pineapple Company and was indeed endorsed by the Pineapple Company at the foot of the contract, as follows: "Approximately 150 acres". (236) And there was also endorsed thereon the estimated yield of pineapples in the following words: "Approximately 1500 tons (Class B 200 tons)." (236) If it had been the intention of the parties to contract only for the yield from Saito's "present holdings at Leilehua", and it was known that his only present holdings were located at Leilehua, why, let us ask, did the agreement provide for "present holding elsewhere on the Island of Oahu, and present holdings that Saito might own or control on the Island of Oahu". Did the Pineapple Company think that Saito might possibly have concealed from it some of his "present holdings" elsewhere than at Leilehua, and which he might secretly own or control elsewhere, and did the Pineapple Company desire to preserve its rights as to such present holdings in case any such were subsequently discovered? But Saito had been a planter for ten years before (225); the Pineapple Company had had a previous contract with him which was canceled by the subsequent contract of May 18, 1916. (34) Of course there was no such thought or purpose in the mind of the Pineapple Company. Either the words in the covenant

of the Pineapple Company, "or elsewhere on the Island of Oahu, or that he may own or control on the Island of Oahu", refer to "present holdings" as appellees and the Supreme Court contend, in which case they are absolutely meaningless in the light of the surrounding circumstances, or they were put into the contract for a purpose, in order to cover *pineapples grown* "elsewhere than on his present holdings at Leilehua", and *pineapples* "that he may own or control on the Island of Oahu".

It does seeem that when the evidence showing the surrounding circumstances is read and considered by the court, that the construction contended for by appellant is so plain that "he who runs may read".

There is the further fact that at the time the Pineapple Company made its contract with Saito, on May 18, 1916, the cannery business was looking very favorable after a prior period of depression. (227) It was probable that the Pineapple Company would want to purchase as large a quantity of pineapples as it could contract for.

It also appears that Saito was only a grower of pineapples and not a canner, and was dependent on the sale of his crop to some canner. (225) Since he made the contract of May 18, 1916, with the Pineapple Company, which to him at the time must have seemed favorable, it is but natural that he would desire, during the four-year period of his contract, to sell to the same canner, his pineapples

grown, owned, or controlled by him during that period, whether from holdings possessed at the time of said contract or subsequently acquired. In fact, it is admitted that "the grower always contracts ahead and the canners always make provision for their packs by contracts for from one to five years". This has been customary with both planter and canner for the past fifteen years. (241)

It is, therefore, respectfully submitted that in addition to the intrinsic evidence afforded by the inspection of the contract itself, the evidence showing the surrounding circumstances of the parties at the time of entering into the contract shows most conclusively that it was the unquestionable intent of the parties that *pineapples grown, owned, or controlled by Saito,* whether from his *present holdings* or *subsequently acquired holdings,* should be included within the contract of May 18, 1916.

In the discussion of our next point we shall see that in fact Saito did sell to the Pineapple Company all of the pineapples grown, or owned, or controlled by him, from subsequently acquired lands, until April 1, 1918, when the tempter came to Saito in the form of the Libby Company, who, although they were advised of his contract with the Pineapple Company, nevertheless offered him more for his pineapples than was provided by his contract with the Pineapple Company, and Saito then concluded to break his contract with the Pineapple Company and delivered his pineapples from subsequently acquired lands to the Libby Company.

Third Point.

THE PRACTICAL CONSTRUCTION OF THE AGREEMENT BY THE PARTIES FOR NEARLY TWO YEARS AFTER IT WAS MADE, IN STRICT ACCORDANCE WITH ITS TERMS AND INTENT AS CONTENDED FOR BY APPELLANT, SHOWS THAT THE PARTIES INTENDED THAT ALL PINEAPPLES GROWN, OWNED OR CONTROLLED ON SUBSEQUENTLY ACQUIRED LANDS SHOULD BE INCLUDED WITHIN ITS TERMS.

It is another elementary but cardinal rule of construction of a contract in case of ambiguity, that

> "where the parties to a contract have given it a practical construction by their conduct—as by acts in partial performance—such construction is entitled to great, if not controlling, weight in determining its proper interpretation, particularly where such interpretation is agreed upon before any controversy has arisen". (13 C. J., 546, and cases cited.)

When, subsequent to May 18, 1916, Saito secured the leasehold interests dated respectively July 1, 1916, and August 10, 1916, he straightway proceeded to deliver the pineapples grown thereon to the Pineapple Company, and the Pineapple Company accepted them and paid for them at the prices provided for by the agreement of May 18, 1916 (239), and this was done although prices of pineapples had advanced one dollar per ton for the larger size, and fifty cents per ton for the smaller size, over the contract prices named in the contract of May 18, 1916. (239) If Saito had not understood that the subsequently acquired pineapples were covered by his contract with the Pine-

apple Company, why did he do this; especially when he could have sold these pineapples either to the Pineapple Company or to one of the other four canning companies. (225) In the statement of evidence prepared by the Chief Justice of the Supreme Court it is stated (238) that Saito continued to sell the pineapples harvested by him from the subsequently acquired leasehold interests up to the end of January, 1918. The admission of Saito himself in his answer, however, goes further and Saito

> "admits that up to April 1, 1918, he delivered to said complainant all Smooth Cayenne pineapples grown by him upon land leased by him upon the Island of Oahu, but denies that he so delivered them under the terms of said contract". (138)

Shortly prior to the cessation of his deliveries of these pineapples to the Pineapple Company, he and one Judkins, the manager of the Libby Company, began their negotiations which led up to the subsequent agreement dated April 1, 1918, between the Libby Company and Saito.

Another controlling circumstance in the subsequent conduct of the parties is the loan made by the Pineapple Company to Saito, on August 10, 1916, to enable him to purchase from the Oahu Railway & Land Co. the subsequently acquired lease of August 10, 1916. (238) It is undisputed that when Saito desired to purchase this leasehold interest for $6000 he applied to the Pineapple Company for the money, and the Pineapple Company advanced him

the money for the purpose of purchasing this leasehold interest, and the money was actually applied to that end. Saito executed his promissory note, payable on or before one year subsequent to August 10, 1916, for $6000, payable to the Pineapple Company and also executed his mortgage to secure said note, on the crops to be harvested from the leaseholds of February 5, 1913, January 2, 1915, and August 10, 1916. (238) The mortgage, copy of which constitutes Exhibit B to Saito's answer (154 to 159), did not require Saito to sell the pineapples produced from any of the lands covered by these leaseholds, to the Pineapple Company, for the reason that Saito was already obligated under his agreement of May 18, 1916, to sell all of the pineapples produced from these leaseholds, to the Pineapple Company. What other object or motive did the Pineapple Company have in advancing the six thousand dollars to Saito, to purchase the leasehold interest of August 10, 1916, unless it was to enable Saito to increase his holdings of pineapples and thereby increase his deliveries of the same to the Pineapple Company. It is perfectly obvious that the Pineapple Company must have understood that it was entitled to receive these pineapples produced from the leasehold of August 10, 1916, or it would have made a supplementary contract with Saito at the time, by which he would have agreed to make deliveries of the pineapples to the Pineapple Company. This would have been only common prudence. And Saito must just as clearly have known

that the Pineapple Company understood that it was entitled to receive these pineapples, and he apparently himself understood that he was obliged to deliver the pineapples produced from this subsequently acquired leasehold. Otherwise, why should he have done so in the face of advancing prices, especially when he was not by any terms of the mortgage obligated in any way to make deliveries of any of these pineapples?

What does Saito say by way of explanation of his conduct?

> "Saito testified on the witness stand that he delivered the pineapples produced from the Chang Chow lot (forming part of the August 10, 1916, leasehold) to the Hawaiian Pineapple Company, Limited, because of the fact that he had borrowed money from the Pineapple Company." (240)

But the insufficiency of this answer is shown by the fact that he was free to have sold the pineapples from this leasehold to third parties for an increased price, and thus have repaid his loan to the Pineapple Company even sooner than he did, had he not believed himself at the time obligated by his contract to sell these pineapples to the Pineapple Company.

In the second place,

> "on the 10th of September, 1917, a statement of account was rendered to Saito by the Hawaiian Pineapple Company, Limited, showing a balance due him of $7204.83, for which he received a check. Shortly thereafter Saito's lease of the

Chang Chow lot covered by the mortgage was returned to him". (238)

Saito's promissory note was marked by the Pineapple Company "Paid Sep. 10, 1917", and returned to him. (153)

> "Saito continued to sell the pineapples harvested by him from the premises subject to the lease of August 10, 1916, during the remainder of the year 1917, and up to April 1, 1918,"

as stated by respondent in paragraph IX of his answer (138),

> "and all pines delivered by Saito to the Company were for the same price stipulated in the agreement of May 18, 1916". (239)

In further contradiction of Saito's statement that the pines from the leasehold of August 10, 1916, were not delivered to the Pineapple Company pursuant to the agreement of May 18, 1916, is the evidence of the witness K. Shibyama, a disinterested witness who acted as interpreter in a conference between Mr. E. C. Peters, one of the attorneys for the Pineapple Company, and Saito, which was had at the home of Saito at Leilehua in the month of June, 1918. Shibyama testified

> "that in the course of this conversation Saito, in reply to questions propounded by Mr. Peters, stated that up to the time he (Saito) saw Mr. Judkins, of Libby, McNeill & Libby of Honolulu, Limited, he believed that he was obliged to deliver the pines which he took off the twenty-acre lot, known as the Chang Chow premises (and constituting part of the leasehold inter-

> est of August 10, 1916), to the Hawaiian Pineapple Company, Limited, under his contract with them''. (240)

It is true that Saito had preceded Shibyama on the witness stand and had at that time denied this conversation (240), but in the face of Saito's actions and in the face of the positive testimony of Shibyama, a wholly distinterested witness, how much weight is to be given to Saito's testimony in this regard? The timeworn maxim of "Actions speak louder than words", is strictly applicable to the present situation.

Another circumstance arising out of the conduct of Saito and tending to show his intent that all pineapples grown on land subsequently acquired by him should be included within the terms of his contract with the Pineapple Company, dated May 18, 1916, is that according to Saito's own admission (paragraph IX of his answer) he went into possession of Lot 9, constituting a part of the leasehold interest of August 10, 1916, on or about June 16, 1916, and proceeded to cut the lantana therefrom, and to clear the same, and to plow it, and to prepare it for planting pineapples. This was less than a month after the execution of his contract with the Pineapple Company. That Saito planted this land in the summer and fall of 1916 is indicated by his first fruit ripening on Lot 9 in June and July, 1918 (240-243), after the usual period of growth of fruit of eighteen to twenty-four months. (226) Saito knew that his fruit would mature dur-

ing the period of this contract. He was an independent grower and employed others for the canning of his fruit. (225) Is it reasonable to suppose that in May 1916, the date of his contract with the Pineapple Company, he intended thereby to provide only for the pineapples that he might for a period of years grow on the one hundred and fifty acres of his then present holdings, and to contract independently with another cannery for the pineapples that he might grow on Lot 9, of 12.8 acres, which (upon the basis of twelve to thirteen tons to the acre) (240) would produce a maximum crop of one hundred and sixty-six odd tons of both grades? These additional pineapples were intended to be included with the pineapples that Saito might "grow on the Island of Oahu", "elsewhere" than on his "present holdings", and it was not until two years later—to be exact, April 1, 1918—that any attempt was made by him to contract with anyone else in respect to pineapples grown on Lot 9. The cost of clearing the land and plowing and planting it to pines was considerable. The situation of the pineapple industry up to 1914-15 was very precarious. Pineapples sold that year below $5.00 a ton, and the larger size sold at $8.00 per ton. In May, 1916, the pineapple business was still very uncertain and the canneries, including that of appellant, were still carrying a heavy stock of pineapples of previous years, which they (227) had been unable to sell. (228) Saito was not satisfied with his "present holdings" and he wanted to secure further areas.

He had a good contract with the Pineapple Company and the future looked brighter. He had a fixed outlet and contract for any pines that he might "grow * * * elsewhere on the Island of Oahu". His prices for his pineapples were fixed by his contract with the Pineapple Company and there was no chance of his getting caught as some planters had been caught in 1914 to 1915, because of their inability to sell their fruit.

Lot 1, of twenty acres, also forming part of his subsequently acquired leasehold interests was planted and bearing and would have a ratoon crop in 1917. The pines that were maturing on Lot 1 in the harvesting period from June, 1916, on to the end of the year, though not grown by Saito in the strict sense of the word, could be considered, and would come under his contract, as pineapples "owned" by him. Those which he would continue to cultivate and which would ratoon in 1917 would come under the contract, and be subject thereto, as pineapples "grown" by him on premises other than his "present holdings". Lots 2 and 3, consisting of 6.36 and 8.55 acres respectively, were planted and would mature in July, 1918 (240-243), at the same time as his plant crop on Lot 9, and would ratoon similarly as the plants on Lot 9, in the summer and winter of 1919.

The Supreme Court did not consider the circumstances that between May, 1916, and December, 1917, all of the premises subject to the subsequently acquired leaseholds of July 1, 1916, and August 10,

1916, were planted to pines to mature in 1917, Lots 2 and 3 in plant to mature in the summer of 1918, Lot 1 with ratoon in 1917, Lot 9 was planted with fruit to crop in 1918, and Lots 10 and 11 were planted with fruit to crop in the summer of 1919, and that from Lots 9, 2 and 3 there would also be ratoons in 1919.

This expenditure of time and money by Saito was absolutely disregarded by the court. To our mind they are extremely important when we consider that in the face of this large expenditure of money, contemplating future results covering a period of years, Saito made no attempt to contract elsewhere for the sale of his pineapples until he was approached by the Libby Company and Saito's cupidity was aroused by the knowledge that he could obtain a better price by selling his pineapples to the Libby Company.

It is, therefore, respectfully submitted that the subsequent conduct of the parties for a period of nearly two years after the execution of their agreement of May, 1916, in strict accord with the terms of said agreement as contended for by the appellant, shows conclusively that it was the intention of both parties that all pineapples grown, owned, or controlled by Saito on the Island of Oahu were contracted to be sold to the Pineapple Company.

Fourth Point.

THE CASE IS A PROPER ONE FOR THE EQUITABLE JURISDICTION OF THE COURT.

It should be observed at the outset that both the trial court and the Supreme Court held that the case was a proper one for injunctive relief as prayed for by appellant if Saito was obligated under the terms of his contract with the Pineapple Company to deliver the pineapples grown upon his subsequently acquired lands. (185)

A full analysis of the evidence and a citation of authorities is contained in the opinion of the Chief Justice (179-185), and reference is hereby made to the opinion. In the course of its opinion the court said:

> "The evidence shows that practically all of the pineapples grown and produced in 1918 on the Island of Oahu were contracted for and that it was impossible for the company, by purchase or otherwise, to secure other pineapples in lieu of those which it claimed to be entitled to receive from Saito. It will thus be seen that an entirely different state of facts exists to those present in the case of *Lum Wai v. Hong Hoon,* 24 Haw, 696, recently decided by this court. In that case, specific performance of a contract for the sale of taro was found, but it was not shown that other taro could not be purchased in the open market, and for that reason it was held that a court of equity was without jurisdiction. * * * But in the Lum Wai case, it was further held that where the chattels are such that they are not obtainable in the market or can only be obtained at great expense and inconvenience and failure to obtain them causes a loss which

could not be adequately compensated in an action at law, a court of equity will decree specific performance. (179-180) * * * *

Had the complainant in this case proceeded at law against the defendant for breach of contract, its measure of damages would have been limited to the difference between the contract and the market price of the pineapples at the time of the breach of the contract, for we are clearly of the opinion that, although perhaps there was a very little, if any, of the article to be obtained in the market at the time of the alleged breach, pineapples in the territory at all times possess a market value which may easily be established in a court of law. Under these circumstances, assuming that the complainant had gone to a court of law for redress, could it have obtained adequate relief? We think not. Complainant contracted to purchase the pineapples for the proper and economical operation of its cannery. The failure of Saito to deliver the pines caused a decrease in the 1918 pack estimated at between 15,000 and 22,000 cases. In view of the fact that other pineapples were not obtainable by the complainant in lieu of those involved in this suit, complainant was bound to have sustained a loss which could not have been adequately measured in damages in a court of law under the rules herein laid down. Cans and other equipment, labor, etc., were required to be provided in advance to take care of the contemplated operation of the cannery, based upon the estimated tonnage of pineapples to be received at the cannery, and for this reason the principles announced in the case of *Curtice Bros. Co. v. Catts,* 96 Atl. 935, applied.

In that case it was held that where the defendant contracted to sell to the plaintiff the entire product of certain lands planted in

> tomatoes which plaintiff required for the operation of the cannery to the full capacity thereof, a specific performance of the contract by defendants would be decreed upon their refusal to fulfill the terms of the contract. The same doctrine was adopted in Texas, Co. v. Central Fuel Oil Co., 194 Fed. 1, 13; also in Equitable Gas Co. v. Baltimore Coal Tar & F. G. Co., 63 Md. 285; also in Gloucester Isinglass & Glue Co. v. Russia Cement Co., 154 Mass. 92, and these authorities received the sanction of this court in Lum Wai v. Hong Hoon, supra.
>
> We are therefore of the opinion that equity had jurisdiction of the cause and that a court of equity alone could afford complainant adequate relief, provided, of course, an interpretation of the contract justifies the conclusion that there was a breach thereof.''

Particular attention is called to the case of Curtice Bros. Co. v. Catts, 72 N. J. Equity 831; s. c. 66 At. 935, cited in the opinion of the Chief Justice quoted above. The facts, briefly, in this New Jersey case were that the complainant's factory had a capacity of about a million cans of tomatoes, the packing season lasting about six weeks. Preparations made for this six weeks of active work must be carried out in all features to enable the business to succeed, these preparations being based primarily on the capacity of the plant. Cans and other necessary equipment, including labor, must be provided and secured in advance, with reference to the capacity of the plant during the packing period. With this known capacity and an estimated average yield of tomatoes per acre, the acreage of

plants necessary to supply the plant is calculated. To that end the contract in question, between plaintiff and defendants, was made, with other like contracts covering a sufficient acreage to insure the essential pack. The defendants who contracted to supply a given acreage, refused to perform their contract, and plaintiff sought equitable relief to enforce the provisions of the contract. The court in sustaining the equitable jurisdiction of the court. said:

> "A refusal of the parties who contract to supply a given acreage to comply with their contracts leaves the factory helpless except to whatever extent an uncertain market may perchance supply the deficiency. The condition which arises from the breach of the contracts is not merely a question of the factory being compelled to pay a higher price for the product. Losses sustained in that manner could with some degree of accuracy be estimated. *The condition which occasions the irreparable injury by reason of the breaches of the contracts is the inability to procure at any price at the time needed and of the quality needed, the necessary tomatoes to insure the successful operation of the plant.*
>
> "If it should be assumed as a fact that upon the breach of contracts of this nature other tomatoes of like quality and quantity could be procured in the open market without serious interference with the economic arrangements of the plant, a court of equity would hesitate to interfere; *but the very existence of such contracts proclaims their necessity to the economic management of the factory.* * * * The business and its needs are extraordinary in that the maintenance of all the conditions prearranged to secure the pack are a necessity to insure the successful operation of the plant.

> * * * The objection that to specifically perform a contract personal services are required, will not divest the court of its powers to preserve the benefits of the contract. Defendant may be restrained from selling the crop to others, and if necessary a reciever can be appointed to harvest the crop."

In Gloucester Isinglass & Glue Co. v. Russia Cement Co., 154 Mass. 92, specific performance of agreement to furnish fish skins was granted where it was shown that such skins were not otherwise purchasable on the open market except at great expense and inconvenience.

In Vail v. Osborne, 174 Pa. St. 580, defendant was enjoined from breaking his contract to sell bark to others, where it was shown that the bark had a peculiar value to the plaintiff because of its proximity to plaintiff's manufacturing plant.

See also to same effect:

> Mutual Oil Co. v. Hills, 248 Fed. 257;
> Maloney v. Cressler, 236 Fed. 636.

The above cases show that the only reason that damages at law were ever considered adequate in the case of a contract for the purchase or sale of chattels, was because that with the money you received by way of damages at law you could purchase like chattels to answer the same purpose. However, as in this case, where you can not buy the article contracted for in the open market, and when you need that article in the active carrying on of a business such as the operation of a cannery, then the legal remedy is totally inadequate and equity will enjoin a breach of contract. If equity left complain-